

In the Appellate Tribunal for Electricity
New Delhi
(Appellate Jurisdiction)

APPEAL NO. 231 OF 2016 & IA NO. 495 OF 2016
AND
APPEAL NO. 399 OF 2017 & IA NO. 1164 OF 2017

Dated: 12th February, 2020

Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. Ravindra Kumar Verma, Technical Member

APPEAL NO. 231 OF 2016 & IA NO. 495 OF 2016

In the matter of:

- 1. M/s. Jodhpur Vidyut Vitran Nigam Limited.**
Through Managing Director
JDVVNL, New Power House
Jodhpur-342003 ... **Appellant No.1**

- 2. Rajasthan Discoms Power Procurement**
Centre Jaipur
Both through its Officer In-charge
XEN (RA-III), RUVVNL, Old Power
house, Rammandir, Banipark
Jaipur-302016 ... **Appellant No.2**

Versus

- 1. Rajasthan Electricity Regulatory Commission**
Vinayak Bhawan, Bais Godam
Jaipur-302001 ... **Respondent No.1**

- 2. M/s. Maharaja Shree Umaid Mills Limited Pali,**
Head office and works at Jodhpur Road, Pali
(Rajasthan)-306401 ... **Respondent No.2**

Counsel for the Appellant(s) : Mr. Bipin Gupta
Counsel for the Respondent(s) : Mr. R. K. Mehta
Ms. Himanshi Andley for R-1
Mr. P. N. Bhandari for R-2

APPEAL NO. 399 OF 2017 & IA NO. 1164 OF 2017

In the matter of:

- 1. M/s. Jodhpur Vidyut Vitran Nigam Limited.
Through Managing Director
JDVVNL, New Power House
Jodhpur-342003 ... Appellant No.1**
- 2. Rajasthan Urja Vikas Nigam Limited Jaipur
Both through its Officer In-charge
Executive Engineer (RA-I), RUVVNL,
Vidhyut Bhawan, Jaipur – 302 005 ... Appellant No.2**

Versus

- 1. Rajasthan Electricity Regulatory
Commission
Vinayak Bhawan, Bais Godam
Jaipur-302001 ... Respondent No.1**
- 2. M/s. Sagar Powertex Pvt. Ltd.
Plant at Rathkuriya, District Jodhpur
Having Registered office at 803,
Sahajaanand, Shahibaug Road,
Ahmedabad – 380004
Though: Managing ... Respondent No.2**

Counsel for the Appellant(s) : Mr. Bipin Gupta
Counsel for the Respondent(s) : Mr. R. K. Mehta
Ms. Himanshi Andley for R-1
Mr. P. N. Bhandari for R-2

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

APPEAL NO. 231 OF 2016 & IA NO. 495 OF 2016

1. Prayer of the Appellant

- a) That the Hon'ble Tribunal may quash and set aside the Order dated 20.06.2016 passed by Respondent No. 1, Rajasthan Electricity Regulatory Commission, in Petition No. RERC-576/2015 and the Petition filed by the petitioner before the Commission may be dismissed.
- b) That the Hon'ble Tribunal may pass such further and other orders as per Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the present case.

2. Questions of Law

- A. Whether the Hon'ble Commission without making an amendment in clause 35 of the regulation of 2014 could pass the Impugned order.
- B. Whether when the Regulation and Tariff prescribed in the PPA was unambiguous then the Commission could ignore

the lower rates of the two that is Preferential or purchases made in the Year when the plant was commissioned and interpret it differently.

- C. Whether when the Commission itself in its judgment has held that the Plain reading of the regulation, the impression is that the tariff shall be the lowest of the purchase rate at which Discoms have purchased the Wind power in that years when the same is provided in the PPA also, then the commission committed illegality to take a different view on the basis of PPA.

3. Facts of the Case

- 3.1 The Appellant M/s. Jodhpur Vidyut Vitran Nigam Ltd. is a company incorporated under the Companies Act, 1956 and is engaged in distribution and supply of electricity in his area.
- 3.2 The Respondent No. 1 is Rajasthan Electricity Regulatory Commission, established under the Electricity Regulatory Commission Act, 2003.
- 3.3 The Respondent No. 2, M/s. Maharaja Shree Ummaid Mills Ltd., is a company registered under Companies Act, 1956 and has installed one wind energy based power plant of 1.25 MW capacity under policy for promoting generation of electricity generation through Wind 2003 at village Soda-Mada District Jaisalmer.

- 3.4 Initially the power purchase agreement in respect of plant stated above were entered between the parties under the REC Mechanism. Subsequently the respondent generator applied for switching over to preferential tariff mechanism under the provisions of RERC Regulations (Determination of Tariff for renewal energy sources wind and solar energy) Regulations 2014 (Hereinafter referred to as the Regulations, 2014).
- 3.5 The amended PPAs as per Regulations were entered between the parties.
- 3.6 The respondent generator was asked to raise invoices on the basis of Regulation of 2014 and tariff as provided under the PPA. The respondent generator aggrieved by it preferred a petition bearing No.576/2015 contending therein that the petitioner cannot be forced to raise invoices on the basis of clause 35 of the Regulations 2014 and also prayed that the Discom may be directed to apply the preferential tariff in the year in which the plant was commissioned.
- 3.7 The State Commission vide order dated 20th June, 2014 held as under :-

“From the foregoing, the petition stands allowed and Commission holds that tariff applicable to the Petitioner’s plants for the electricity supplied as per agreement shall be the tariff determined by the Commission for the year in which the plants were commissioned/achieved CoD.”

3.8 Aggrieved by the Impugned Order dated 20.06.2016 passed by the Respondent State Commission, the Appellant has filed the instant Appeal.

4. Submissions of the Appellant

4.1 Finding it difficult to sustain under the REC Mechanism, the respondent generator applied for switching over to preferential tariff mechanism under the provisions of RERC Regulations (Determination of Tariff for renewal energy sources wind and solar energy) Regulations 2014 (Hereinafter referred to as the Regulations, 2014) as per notified on 24/2/2014. Which reads as under :-

35. Tariff for plants under the REC Mechanism:

“In case a wind or solar generator desires to switch over from the REC Mechanism to preferential tariff mechanism under regulation 12 (2) of RERC (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010 and if the Discom agrees to purchase considering the scope to accommodate the same in RPO target, the levelized tariff determined in accordance with these Regulations for sale to Distribution Licensee in respect of the year in which the plant was commissioned shall be applicable. However, in case purchase by the Discom in the same year in which such plant(s) was commissioned has been at a rate lower than the levelised tariff

determined for that year, the lowest rate of such purchase would be applicable. The same principle would be applicable to the plants commissioned during the previous MYT Control Period ending on 31.3.2014.”

4.2 The Appellant has submitted that clause 35 of the Regulation 2014 made it permissible for one time shifting of generators having PPA in REC Mechanism to preferential tariff with a condition that generators would be paid either levelized tariff determined in accordance with the Regulations for sale to distribution licensee in respect to year in which the plant was commissioned or lowest rate on which power purchases was made by Discom in that year and it was specified that out of these two rates lower would be paid. It was further contended in the reply that even the amended PPA provided the tariff as provided under clause 35 of the Regulation 2014.

4.3 The State Commission vide order dated 20th June, held as under:-

“From the foregoing, the petition stands allowed and Commission holds that tariff applicable to the Petitioner’s plants for the electricity supplied as per agreement shall be the tariff determined by the Commission for the year in which the plants were commissioned/achieved CoD.”

4.4 The State Commission failed to consider the issue in correct perspective and without making an amendment in the regulation,

the Impugned order has been passed ignoring the fact that under regulation and PPA, the Discom was to pay lower of the two Tariffs from the levelised or purchases made in the Year when the Plant was commissioned.

- 4.5 That the State Commission inspite of recording in para 15 of the order as under has committed illegality in reading clause 35 in different manner:-

“on first reading of the above, one gets an impression that the tariff applicable to the instant plants shall be based not on the generic tariff determined by the Commission but on lowest of the purchase rate at which the Discoms have purchased the wind power in that year. However, when we consider the above along with the preamble of PPAs, the intention of parties while signing the PPAs appears that the Petitioner will be paid at the preferential tariff determined by the Commission with respect to the years of CoD.”

Further the PPA also provides as under:-

"The levelised tariff determined in accordance with these Regulations for sale to Distribution Licensee in respect of the year in which the plant was commissioned shall be applicable. However, in case purchase by the Discom in the same year in which such plant(s) was commissioned has been at a rate lower than the levelized tariff determined for that year, the lowest rate of such purchase would be applicable.”

Further para 18 reads as under :-

“18. The intention of second part of Regulation 35, which is also incorporated in PPAs, is to deal with the cases wherein tariff is also determined through competitive bidding or otherwise for the year in which such plants were commissioned/ achieved CoD. It further restricts the tariff payable to the lower tariff arrived at through competitive bidding or otherwise for that year. The reference to the “rate lower than the levelised tariff determined for that year” in the above Regulation is with reference to rates discovered through competitive bidding or otherwise for plants which were commissioned/achieved CoD in the same year. Since in the case of wind power purchase, competitive bidding was not done, the generic tariff as determined by the Commission is applicable.”

4.6 Ignoring the Schedule of Tariff in the PPA and on the Basis of preamble of the PPA, the impugned order has been passed which is legally not correct as the Regulation and PPA were Unambiguous and there was no need to interpret it differently putting the words of “Competitive bidding” though no such words existed either in the Regulation or PPA and therefore also the Impugned order is liable to be set aside.

4.7 The State Commission has not considered the fact that clause 5 of the PPA reads as Power purchase price:-

“i) the price to be paid by the discom, net at all GOR and local taxes and duties as may be leviable on generation and /or sale

of electricity for all electricity made available and sold by the Power Producer to Discom shall be based on the tariff specified by RERC” , which read as under:-

"The levelised tariff determined in accordance with these Regulations for sale to Distribution Licensee in respect of the year in which the plant was commissioned shall be applicable. However, in case purchase by the Discom in the same year in which such plant(s) was commissioned has been at a rate lower than the levelized tariff determined for that year, the lowest rate of such purchase would be applicable."

Thus the Regulation and PPA clearly provided the lower of the levelised tariff and the rate of purchases made by Discom in the year of commissioning of such plants was to be paid to the Generator and therefore ignoring the fact of Lower of the Two and not applying lower of the Two , the commission committed gross Illegality in passing the Impugned Order.

4.8 In a judgment passed by Hon'ble Apex Court in case of Gujrat Urja Vikas Nigam Vs. Emco and others Civil Appeal No. 1220/15 decided on 2/2/2016 has held as under:

"29. But the availability of such an option to the power producer for the purpose of the assessment of income under the IT Act does not relieve the power producer of the contractual obligations incurred under the PPA. No doubt that the 1st respondent as a power producer has the freedom of contract either to accept the price offered by the

appellant or not before the PPA was entered into. But such freedom is extinguished after the PPA is entered into.

30. The 1st respondent knowing fully well entered into the PPA in question which expressly stipulated under Article 5.2 that “the tariff is determined by Hon’ble Commission vide tariff order for solar based power project dated 29.1.2010

31. Apart from that both the respondent No. 2 and the appellate tribunal failed to notice and the 1st respondent conveniently ignored one crucial condition of the PPA contained in the last sentence of para 5.2 of the PPA:- “In case, commissioning of Solar Power Project is delayed beyond 31st December 2011, GUVNL shall pay the tariff as determined by Hon’ble GERC for Solar Projects effective on the date of commissioning of solar power project or above mentioned tariff, whichever is lower.” The said stipulation clearly envisaged a situation where notwithstanding the contract between the parties (the PPA), there is a possibility of the first respondent not being able to commence the generation of electricity within the “control period” stipulated in the 1st tariff order. It also visualised that for the subsequent control period, the tariffs payable to a PROJECTS/power producers (similarly situated as the first respondent) could be different. In recognition of the said two factors, the PPA clearly stipulated that in such a situation, the 1st respondent would be entitled only for lower of the two tariffs. Unfortunately, the said stipulation is

totally overlooked by the second respondent and the appellate tribunal. There is no whisper about the said stipulation in either of the orders.”

Thus the Above judgment lays down the correct position of Law and PPA tariff condition cannot be overlooked by the Commission, therefore the impugned Judgment is liable to be set aside.

4.9 This Tribunal vide order dated 3/9/2019 directed both the parties to file affidavit as to whether the rate mentioned as Rs.4.46 in schedule of PPA is levelised tariff or the lowest purchases rate or it is the lowest rate. In that regard the Appellant has filed affidavit on 19-9-2019 which reads as under:-

- i. That I being the Officer-in-charge in the above mentioned matter and, as such, I am well conversant with the facts and circumstances of the case and am fully competent to swear this affidavit.
- ii. That the tariff mentioned in the PPA of 2014 indicating figure of 4.46 is the levelised tariff of the year in which the plant of the respondent was commissioned i. e levelised Tariff of 2011-12 where as the petitioner instead of opting levelised tariff had opted for REC mechanism in 2011-12. This figure was to indicate the levelised tariff of 2011-12.
- iii. That the lowest purchases of wind energy made by the Discom in the year 2011-12 is Rs. 3.26 and 2012-13 is Rs.3.31. Thus

the figure indicated as Rs. 4.46 is not the lowest purchases made in 2011-12.

4.10 The Respondent No. 2 has also filed affidavit in compliance of the this Tribunal order which reads as under:-

“8. That it is reiterated that it was not the lowest rate of purchase by Discom either for 2011-12 or 2012-13 or for any other year.”

4.11 The above affidavit of appellant as well as respondent makes it clear that the rates shown as Rs.4.46 was not the lowest purchases rates and therefore the order passed by the commission to pay Rs 4.46 is illegal and is liable to be quashed and set aside.

5. Submissions of the Respondent No. 1/the State Commission

5.1 By order dated 09.11.2019, this Tribunal directed as under:

“The Respondent, Commission is directed to place on record the details pertaining to Wind Energy Tariff for the disputed years 2011-2012 & 2012-2013 and how many tariff were in existence in terms of Commission's orders.

We also direct the Respondent, Commission to place on record, in the understanding of the Respondent, Commission, what do they mean by referring to Levelised Tariff.

We further direct the Respondent, Commission to place on record the Wind Policy notified and how Tariff was escalated in terms of the policy from year to year. Also the Respondent, Commission may clarify whether this year to year escalated tariff means Levelised Tariff?”

A. Wind Energy Tariff prevalent during the years 2011-2012 and 2012-2013

5.2 During the year 2011-12, 2012-13 two kinds of Tariffs were in existence in respect of the Wind Power Plants whose PPAs were signed under various State Government Policies and which were commissioned upto 31.03.2007, as under:

(A) Projects Commissioned upto 31.03.2007:

S.No	Particulars	Tariff applicable during FY 2011-12	Tariff applicable during FY 2012-13
1	PPAs executed under Government of Rajasthan (GoR) Policy, 1999 dated 11.03.1999.	Rs 5.1855/kWh	Rs 5.4448/kWh
2	PPAs executed under GoR Policy, 2000 dated 4.02.2000.	Rs 5.1823/kWh	Rs 5.4414/kWh
3	PPAs executed under GoR Policy, 2003 dated 30.04.2003.	Rs 3.8512/kWh	Rs 3.9176/kWh
4	PPAs executed under GoR Policy, 2004 dated 25.10.2004 (wind energy projects commissioned upto 23.02.2006).	Rs 3.26/kWh	Rs 3.31/kWh
5	PPAs executed under GoR Policy, 2004 dated 25.10.2004 (wind energy	Rs 3.61/kWh	Rs 3.67/kWh

projects commissioned after 23.2.2006 upto 31.03.2007).		
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(B) Projects commissioned after 31.03.2007 and upto 31.03.2009 specified under Commission's order dated 09.03.2007.

Year of Commissioning	Tariff applicable during FY 2011-12				Tariff applicable during FY 2012-13			
	Jaisalmer, Barmer, Jodhpur Distts.		Other Distts.		Jaisalmer, Barmer, Jodhpur Distts.		Other Distts.	
	EHV	33/11k V	EHV	33/11kV	EHV	33/11k V	EHV	33/11 kV
2007-08	3.67	3.56	3.83	3.72	3.69	3.58	3.87	3.76
2008-09	3.65	3.54	3.79	3.68	3.67	3.56	3.83	3.72

5.3 Consequent upon the notification dated 23.01.2009 of the RERC Tariff Regulations, 2009 Levelised Tariff for Wind Power Plants came to be specified under the yearly orders passed by the Commission on the basis of year of commissioning of the project. The Levelised Wind Energy Tariff of Wind Plants commissioned in the years 2009-10, 2010-11, 2011-12 and FY 2012-13 applicable during FY 2011-12 & FY 2012-13 is as under:

Year of Commissioning	Tariff applicable during FY 2011-12		Tariff applicable during FY 2012-13		Tariff Order
	Jaisalmer, Barmer, Jodhpur Districts	Other Districts	Jaisalmer, Barmer, Jodhpur Districts.	Other Districts	
FY 2009-10	4.28	4.50	4.28	4.50	
FY 2010-11	4.10	4.31	4.10	4.31	
FY 2011-12	4.46	4.69	4.46	4.69	
FY 2012-13 (without Higher Depreciation)	-	-	5.18	5.44	

benefit)					
FY 2012-13 (with higher Depreciation benefit)	-	-	4.89	5.13	

B. Levelised Tariff

- (a) Levelised Tariff is a single rate applicable to the useful life of the project without any escalation. It is calculated by first taking the net present value of the total operating cost such as interest cost, O&M Expenses, Depreciation cost, interest on working capital and return on equity grossed up for applicable tax rate of the wind power generating asset. This number is then divided by the net present value of the total electricity generation over its useful lifetime. Detailed calculations are provided in tariff orders.
- (b) In Para 79 of the Memo on Statement of Objects & Reasons and consideration of Comments/Objections/Suggestions dated 23.01.2009 issued in respect of RERC Tariff Regulations, 2009, the Commission observed as under:

“79..... To take care of interest of all stakeholders, the levelised tariff corresponding to the project life shall be specified. In this context, the Commission observes that while front loaded tariff meets the requirement of the RE project developer, it requires significant cash flow impact for the utilities during initial period. Besides, there is little incentive for the RE developer to continue with the existing energy purchase agreement

with the Utility once the debt service obligations are over. On the other hand, back-loaded tariff structure meets with the requirement of utility, significant back-ending would impact project cash flow and may not meet requirement of the project lenders/investors. Levellised tariff with appropriate discount rate representing cost of capital or time value of money yields necessary balance between front-loaded or back-loaded tariff structure and has been in practice in many States. Further, in order to operationalise indexing mechanism over Control Period and operational period of the project, levellised tariff structure is best suitable to address such indexing requirement. Hence, the Commission has adopted levellised tariff structure approach for determination of RE Tariffs.”

C. State Government policies for Wind Power Plants

(a) State Govt Policy 1999 notified on 11.03.1999:

Rs 2.75/unit applicable for the year 1998-99. This rate to be increased @ 5% every year on 1st April of the year for a period of 10 years from the date of signing of PPA.

S.No.	Renewable Energy Generation during the year	Wind energy Tariff in Rs. Per unit
1	1998-99	2.7500
2	1999-00	2.8875
3	2000-01	3.0319
4	2001-02	3.1835
5	2002-03	3.3426
6	2003-04	3.5098
7	2004-05	3.6853
8	2005-06	3.8695
9	2006-07	4.0630

S.No.	Renewable Energy Generation during the year	Wind energy Tariff in Rs. Per unit
10	2007-08	4.2662
11	2008-09	4.4795
12	2009-10	4.7034
13	2010-11	4.9386
14	2011-12	5.1855
15	2012-13	5.4448
16	2013-14	5.7171

(b) State Govt Policy, 2000 notified on 04.02.2000:

Rs 3.03/unit for power supplied during financial 2000-2001 which shall be increased @ 5% every year on 1st April of the year for a period of 10 years from the date of signing of PPA.

S.No.	Renewable Energy Generation during the year	Wind energy Tariff in Rs. Per unit
1	1998-99	-
2	1999-00	-
3	2000-01	3.0300
4	2001-02	3.1815
5	2002-03	3.3406
6	2003-04	3.5076
7	2004-05	3.6830
8	2005-06	3.8671
9	2006-07	4.0605
10	2007-08	4.2635
11	2008-09	4.4767
12	2009-10	4.7005
13	2010-11	4.9356
14	2011-12	5.1823
15	2012-13	5.4414
16	2013-14	5.7135

(c) State Govt Policy, 2003 notified on 30.04.2003:

Rs 3.32/unit for power supplied during 2003-04 which shall be increased at a simple rate of 2% (of Rs 3.32) every year on 1st April of the year for a period upto 10 years, i.e. upto 2012-13 with base year 2003-04. Thereafter, from 2013-14 and onwards a fixed rate of Rs 3.92/unit to be paid upto the 20th year of the project.

S.No.	Renewable Energy Generation during the year	Tariff (in Rs. Per unit)
1	2003-04	3.3200
2	2004-05	3.3864
3	2005-06	3.4528
4	2006-07	3.5192
5	2007-08	3.5856
6	2008-09	3.6520
7	2009-10	3.7184
8	2010-11	3.7848
9	2011-12	3.8512
10	2012-13	3.9176
11	2013-14	3.9200
12	2014-15	3.9200
13	2015-16	3.9200
14	2016-17	3.9200
15	2017-18	3.9200
16	2018-19	3.9200
17	2019-20	3.9200
18	2020-21	3.9200
19	2021-22	3.9200
22	2022-23	3.9200
21	2023-24	3.9200

[Source: GoR Policy 2003 & RERC Tariff Regulations 2009]

(d) State Govt Policy, 2004 notified on 25.10.2004 and subsequent Amendments:

Tariff Schedule 1A for Non-Conventional Energy Sources
(Clause 7.2 of the Policy):

[For Wind Energy Projects commissioned under Policy 2004
upto 23.02.2006]

S.No.	Financial Year COD	*Wind Rs per kWh
1	2004-05	2.91
2	2005-06	2.96
3	2006-07	3.01
4	2007-08	3.06
5	2008-09	3.11
6	2009-10	3.16
7	2010-11	3.21
8	2011-12	3.26
9	2012-13	3.31
10	2013-14	3.36
11	2014-15	3.36
12	2015-16	3.36
13	2016-17	3.36
14	2017-18	3.36
15	2018-19	3.36
16	2019-20	3.36
17	2020-21	3.36
18	2021-22	3.36
19	2022-23	3.36
20	2023-24	3.36

[Source: GOR Policy 2004 & RERC Tariff Regulations 2009]

Tariff Schedule 1 B for Wind Energy (Clause 7.2 of the Policy)

[For Projects commissioned after 23.02.2006]

S.No.	Financial Year of COD	Rs./kWh
1	2005-06	3.25
2	2006-07	3.31
3	2007-08	3.37
4	2008-09	3.43

5	2009-10	3.49
6	2010-11	3.55
7	2011-12	3.61
8	2012-13	3.67
9	2013-14	3.73
10	2014-15	3.79
11	2015-16	3.79
12	2016-17	3.79
13	2017-18	3.79
14	2018-19	3.79
15	2019-20	3.79
16	2020-21	3.79
17	2021-22	3.79
18	2022-23	3.79
19	2023-24	3.79
20	2024-25	3.79
21	2025-26	3.79

[Source: GOR Policy 2004 & RERC Tariff Regulations 2009]

D. Whether the year-to-year escalated tariff means the levelised tariff?

Levelised Tariff is a specially designed tariff structure where the same rate is fixed for the entire PPA duration/useful life of the generation asset and there is no escalation in it. In the State Govt Policies, a wind energy tariff was prescribed for the base year of the policy which was to be escalated year-to-year as indicated in the respective policy. This year-to-year escalated tariff is different from a levelised tariff, as the levelised tariff remains the same (with no escalation) for the entire useful life/PPA duration of a project.

6. Submissions of the Respondent No. 2

- 6.1 The appellant is deliberately misleading by claiming that the tariff indicated in the PPA was for REC mechanism. The real fact is that the levelized tariff was for the switch over to preferential mechanism and had nothing to do with the past PPAs under REC mechanism or other PPAs where plants were commissioned several years back. No conditions were attached for switch over, except that the Discom may allow such switch over, if so required by it.
- 6.2 It was meant for PPAs of solar energy but erroneously included in this PPA regarding wind energy. A lower rate in the same year, for plants commissioned in the same year, is possible only if bidding takes place in the same year and not otherwise.
- 6.3 What is the source of the lowest purchase rate? It does not and cannot emerge through bilateral negotiations between the Discoms and the generators.
- 6.4 In para 18, 19, 20 & 22 of the impugned order dated 20.6.2016, the Id. Commission opined thus-

“18. The intention of second part of Regulation 35, which is also incorporated in PPAs, is to deal with the cases wherein tariff is also determined through competitive bidding or otherwise for the year in which such plants were commissioned/ achieved cod. It further restricts the tariff payable to the lower tariff arrived at through competitive bidding or otherwise for that year. The reference to the “rate lower than the levelised tariff determined for that year” in the above Regulation is with reference to rates discovered through competitive

bidding or otherwise for plants which were commissioned/achieved cod in the same year. since in the case of wind power purchase, competitive bidding was not done, the generic tariff as determined by the Commission is applicable.”

- (a) In the above para, the Commission has rightly elaborated that only the lowest purchase price of any plant commissioned in the same year, would be considered for this.
- (b) This observation is very significant to remove any confusion about the lowest rate of purchase. Many PPAs were executed several years back in the past. Tariff of such plants may be lower. Therefore the Commission was particularly conscious that the “lowest rate of purchase” was relevant, only if that rate had emerged for plants commissioned in the “same year”.
- (c) In other words, the lower rate of past PPAs, which were commissioned long back, were not to be considered for calculating the “lowest purchase cost” as these plants had not been commissioned in the “same year”.

7. Counter submissions of the Appellant to the submissions made by the Respondent No. 2

- 7.1 The Respondent No.2 in his reply has strenuously contended that the case of the Respondent is to be governed by the tariff orders issued by the Commission for the year 2011-12 vide order dated 14.12.2011 and has also strenuously relied on the order dated

7.9.2012 passed by the Commission for the year 2012-13. The said orders passed by the Commission were the tariff orders which were to be applied for the plant commissioned in the respective years and which right from the beginning opted for preferential tariff. Whereas, the case of the Respondent is different and is dependent on Regulation 35 of the Regulations 2014 which gave an option for the plants who were being paid under REC Mechanism to convert to preferential tariff mechanism with an exception provided under the said very Regulation and therefore, the Respondent's case could not have been strictly governed as being claimed by them but has to be governed accordingly to Regulation 35.

- 7.2 The Respondent No.2 in his reply has stated that the first part of Regulation 35 uses the word shall and the second part uses the lower of tariff which is contradictory. The said contention of the Respondent No.2 is also not admitted and is denied and neither is the intention of Regulation. The first part of Regulation 35 says that the plants which want to switch over from REC Mechanism to preferential tariff mechanism, the levelized tariff determined in which year plant was commissioned shall be applicable with an exception provided under part II thus, if the purchases are made at more rate in that year then the plant will receive the maximum of levelized tariff in which the plant was commissioned. But however in case, if the purchases were made at less prices then the lower would be paid and this was to be applied for both wind or solar generator thus the contention of the respondent to state that Regulation 35 applies only to solar and not on wind generators is also wrong and is against the Regulation 35.

- 7.3 The Respondent in his reply have tried to show and to have equated him with the plants who had from the beginning opted preferential tariff which would not have done so as in the present case, the Commission in his wisdom had permitted the generators who were under REC mechanism to switch over to preferential tariff mechanism by coming out through an amendment under Regulation 35 of the Regulation 2014. The Respondent cannot claim himself the same benefit as the persons who right from the beginning opted for preferential tariff. The Respondent cannot also claim to take benefit of part I of clause 35 and to say that part II of 35 will not apply on him and will apply on solar generator, the said is also not worded in Regulation 35 as being claimed by the Respondent No.2 and therefore, the Respondent cannot be equated with the plants who have opted from the beginning the preferential tariff mechanism and the case of the Respondent would strictly be governed by Regulation 35 of the Regulation 2014.
- 7.4 It is therefore prayed that rejoinder to the reply may kindly be taken on record and the appeal of the appellants may kindly be allowed.
8. We have heard learned counsel Mr. Bipin Gupta appearing for the Appellants, the learned counsel Mr. R.K. Mehta for the State Commission and the learned counsel Mr. P.K. Bhandari for the Respondent No.2 at considerable length of time and we have gone through the written submissions carefully and also taken into consideration the relevant material available on records in file.

9. The issues and facts of the case and the submissions of the Appellants in both the Appeals are similar, therefore for the sake of brevity, we shall consider the facts and issues of appeal No.231 of 2016 and shall render common judgment.

10. **Our considerations and analysis**

i) The learned counsel for the Appellant submitted that the State Commission in respect of recording in para 15 of the order has committed illegality in reading clause 35 in different manner. The learned counsel for the Appellant further submitted that the State Commission in their order under para 18 has recorded that “rate lower than the levelised tariff determined for that year” in the above Regulation is with reference to rates discovered through competitive bidding or otherwise for plants which were commissioned/achieved CoD in the same year. Since in the case of wind power purchase, competitive bidding was not done, the generic tariff as determined by the Commission is applicable.”

The learned counsel for the Appellant further submitted that ignoring the schedule of tariff in the PPA and on the Basis of preamble of the PPA, the impugned order has been passed which is legally not correct as the Regulation and PPA were

Unambiguous and there was no need to interpret it differently putting the words of “Competitive bidding” though no such words existed either in the Regulation or PPA and therefore also the Impugned order is liable to be set aside.

- ii) ***Per contra***, the learned counsel for the Respondent No.2 submitted that so obviously, if no bidding has taken place in wind energy till today, as submitted in the latest affidavit and as reiterated by the Commission, then obviously the so-called “lowest purchase price” pertains to old PPAs, where these plants were commissioned several years back. These rates of the old PPAs would not be applicable, as these plants were commissioned long back, and not in the same year, as stipulated in Regulation 35 and Annexure B of the PPA.

This observation is very significant to remove any confusion about the lowest rate of purchase. Many PPAs were executed several years back in the past. Tariff of such plants may be lower. Therefore the Commission was particularly conscious that the “lowest rate of purchase” was relevant, only if that rate had emerged for plants commissioned in the “same year”.

- iii) The issue in the present appeal is **“Whether the Impugned Order passed by the State Commission is in line with the RERC Regulation, 2014”?**

Let us have a look at the Regulation 35 which is reproduced as below:

35. Tariff for plants under the REC Mechanism:

“In case a wind or solar generator desires to switch over from the REC Mechanism to preferential tariff mechanism under regulation 12 (2) of RERC (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010 and if the Discom agrees to purchase considering the scope to accommodate the same in RPO target, the levelized tariff determined in accordance with these Regulations for sale to Distribution Licensee in respect of the year in which the plant was commissioned shall be applicable. However, in case purchase by the Discom in the same year in which such plant(s) was commissioned has been at a rate lower than the levelised tariff determined for that year, the lowest rate of such purchase would be applicable. The same principle would be applicable to the plants commissioned during the previous MYT Control Period ending on 31.3.2014.”

- iv) From the Regulation, it is clear that this Regulation is common for wind as well as solar generators to enable them to switch over from REC mechanism to preferential mechanism.

- v) The Regulation further says that on switch over, such plants will be paid lower of the following two tariffs:-
 - a) The levelised tariff in respect of the year in which the such plant was commissioned or
 - b) The purchases made by the Discom in the same year in which such plant was commissioned.

- vi) The levelised tariff determined in accordance with these Regulations for the year in respect of the year in which the plant was commissioned was Rs. 4.46/kWh.

- vii) From the details submitted by the Respondent State Commission the Discom procured power from various generating stations under various State Government policies and these plants were commissioned upto 31.03.2007. In other words, all these procurements were made as per old Power

Purchase Agreements (“PPA”) made much earlier on or before 31.03.2007.

- viii) As no other new purchases were made in the year in which such plants were commissioned, therefore, as per the Regulations such wind energy plants which desired to switch over from the REC mechanism to preferential mechanism will be paid at the levelised tariff at Rs. 4.46/kWh determined in accordance with Regulations.
- ix) As such we do not agree that the submissions made by the Appellant that the State Commission committed illegality in reading clause 35 in different manner and has ignored the schedule of tariff in the PPA. We agree with the submissions made by the Respondent No.2 that rates of old PPA would not be applicable as those plants were commissioned long back and not in the same year as stipulated in Regulation 35 and annexure B of the PPA
- x) In view of above we are of the considered opinion that the above aspect have been dealt with by the State Commission in detail in its Impugned Order and as such we do not find any error, material irregularity or legal infirmity in the Impugned Order dated 20.06.2016 passed by the 1st Respondent/the Central Commission

in Petition No. RERC-576/2015. The Impugned Order is well founded, well reasoned, hence does not call for interference by this Tribunal.

ORDER

Having regard to the facts and the circumstances of the case as stated above, the instant Appeals being Appeal No. 231 of 2016 and Appeal No. 399 of 2017 filed by the Appellants are hereby dismissed as devoid of merits.

The Impugned Order dated 20.06.2016 passed by the 1st Respondent/the Central Commission in Petition being No. RERC-576/2015 is hereby upheld.

In view of the judgment/order passed in the Appeal No. 231 of 2016 and Appeal No. 399 of 2016, the relief sought in IA No. 495 of 2016 and IA No. 1164 of 2017 do not survive for consideration and stand disposed of.

No order as to costs.

Pronounced in the Open Court on this **12th day of February,**

2020.

(Ravindra Kumar Verma)
Technical Member

√

REPORTABLE/NON-REPORTABLE

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(Justice Manjula Chellur)
Chairperson